

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CIRCLE K RANCH
8700 S. Leonard Avenue
Fowler, CA 93625

Employer

Docket No. 03-R2D5-9438

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Circle K Ranch (Employer).

JURISDICTION

On May 2, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at Manning between Leonard & McCall, Fowler, California (the site).

On October 18, 2001, the Division issued to Employer one citation alleging general violations of section 3457(c)(3)(B) [clean toilets]; and section 3457(c)(3)(C) [toilet paper] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ The Division proposed civil penalties totaling \$1,650 for the alleged general violations.

On November 8, 2001, Employer initiated its appeal by facsimile letter. On November 20, 2001, the Board sent an appeal form to Employer to complete and return to the Board no later than December 5, 2001, in order to perfect the appeal. On January 17, 2002, the Board closed Employer's file due to the appeal form not being returned and mailed a closing letter to Employer.

The closing letter provided that if Employer wanted to re-open the appeal, a written request to re-open the appeal must be submitted to the Board no later than 15 days from the date of the letter, i.e., no later than February 1, 2002.

¹ Unless otherwise specified all section references are to Title 8, California Code of Regulations.

On April 30, 2002, after Employer received a payment reminder from the Collections Unit of the Department of Industrial Relations, Employer faxed a letter and phoned the Board to request that its appeal be re-opened. Employer was given instructions on how to proceed. On October 7, 2002, Employer returned the appeal form but did not sign it or enclose a copy of the citation they wanted to appeal.² Employer also enclosed a statement explaining why its appeal form was not timely submitted to the Board which stated, in pertinent part, that Employer learned by registered letter that it had not filed the appeal timely; that Employer faxed the Board on April 30, 2002 and again on May 21, 2002 with no response, and after being pre-occupied with harvest for 3 months, Employer then telephoned the Board and was advised to re-submit the appeal and explain why it was delayed.

On February 6, 2003, Employer eventually returned the completed appeal form.

On February 27, 2004, the Board issued an Order Closing Appeal finding that although Employer eventually returned the completed form and citation, good cause was not established for the lengthy delay.

On March 3, 2004, Employer filed a petition for reconsideration which states that the evidence does not support the findings of the Board that good cause was not established for the lengthy delay. Based upon Employer's listing of the procedural events regarding its attempts to appeal, Employer states that the reason for the delay was "the inaction and slow response of the OSHA office and the appeals board."

ISSUE

Has Employer established good cause for having their appeal case reopened?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6319 states that an "employer has 15 working days from receipt of the notice [of citation] within which to notify the appeals board that he or she wishes to contest the citation or order...."

Title 8, California Code of Regulations, section 359 states:

² On January 31, 2003, the Board sent a letter to Employer requesting that Employer complete the appeal form and attach a copy of the citation.

- (a) Except as provided in Section 361.1(b), an appeal shall be deemed filed on the date a communication indicating a desire to appeal the Division action is hand delivered, mailed to, or received by the Appeals Board in Sacramento, California, whichever is earlier. No particular format is necessary to institute the appeal.
- (b) The time for filing any appeal may be extended or a late filing permitted upon a written showing of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing.
- (c) A request to file a late appeal shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.

Section 359.1 states:

- (a) A completed appeal form shall be filed for each contested Division action.
- (b) If an appeal is initiated by other than an appeal form, a completed appeal form shall be filed with the Appeals Board within 10 days of acknowledgement by the Appeals Board of the desire to appeal. Failure to file a completed appeal form may result in dismissal of the appeal.
- (c) The Appeals Board shall furnish appeal forms upon request and shall provide them to the district offices of the Division.
- (d) Upon receipt of a timely completed appeal form, the Appeals Board shall assign a docket number and deliver or mail a copy of the docketed appeal to each party.

In this case, Employer filed its appeal by letter fax on November 8, 2001. This manner of filing is satisfactory to the Board as long as it is followed by the filing of a completed appeal form with the Board within 10 days of the Board's acknowledgement of Employer's intent to appeal. (*Shasta Constructors, Inc.*, Cal/OSHA App. 01-9236, Denial of Petition for Reconsideration (May 29, 2002); *Envirokleen Contractors, Inc.*, Cal/OSHA App. 01-9198, Denial of Petition for Reconsideration (Mar. 15, 2002)) That was not done to the Board's satisfaction in this case.

On November 20, 2001, the Board sent its acknowledgement of the appeal and enclosed an appeal form which was required to be filed with the Board within 10 days thereafter. In its petition, Employer asserts that on November 20, 2001, appeal forms were mailed to them but "[w]e never received them, or they were mishandled by our office."³ Employer does not deny that it

³ In its initial request to the Board to re-open the appeal, Employer did not allege that it did not receive the appeal forms which it now raises in its petition for reconsideration. The Board's file contains a fax sent by Employer on April 30, 2002, where Employer states it either did not receive the appeal form or someone misplaced the appeal form. This fax appears to be in response to a second request for an appeal

received the subsequent letter from the Board on January 17, 2002 which informed Employer that the case was being closed due to the failure to file an appeal form. The completed forms were not submitted to the Board until February 6, 2003,—over 14 months after the time required for filing the appeal form.

Good cause for the delay in perfecting the appeal is not supported by the facts in this case. It was not until Employer received a payment reminder from Collections that Employer contacted the Board on April 25, 2002—nearly 6 months after initiating its appeal. Employer communicated with the Board by phone and was instructed on how to proceed to re-open its closed appeal. However, after contacting the Board, the completed appeal form was still not filed with the Board for nearly 10 more months after being instructed on how to proceed. During this 10 month period, Employer maintains it twice faxed a request for appeal forms (on April 30 and May 21) with no response.⁴ Employer did not further contact the Board until October 4, 2002, after which it submitted a deficient appeal form and no copy of the citation from which it was seeking to appeal. From the end of April 2002 when Employer was verbally instructed on how to proceed to October 4, 2002, Employer did not submit any of the required documents (appeal form and request to re-open appeal). The five month delay is not sufficiently addressed by Employer and it was not for another additional 3 months that Employer eventually filed a completed appeal form on February 6, 2003.

Prompt resolution of citations is imperative to insure that both sides to an appeal have an opportunity to fully present their case. The Board held in *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001) that, “appeals to the Board should be pursued by the appealing party with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs. It is incumbent upon an appealing party to become familiar with the appeal process and requirements in order to further its interests in an orderly disposition of the appeal by the Board, affording due process to all of the parties, and avoiding undue prejudice to the Division and any third party to the appeal.”

The Board finds that Employer did not act with the degree of care required pursuant to the findings in *Timothy J. Kock*, *supra*, in pursuing its appeal in this case. Employer essentially asks this Board to excuse its dilatory

form following the closing of the file and the phone conversation Employer had with a Board staff member on April 25, 2002. In its petition for reconsideration, Employer only now asserts that it never received the initial appeal form mailed by the Board in November 2001 after the initiation of the appeal.

⁴ In its petition, Employer states that it called and spoke with someone from the Board on April 25, 2002. Additionally, our review of the Board's file reveals a fax from Employer on April 30, 2002, stating Employer either never received the appeal form or someone misplaced the appeal form, and requested another opportunity to appeal the citation. A notation in the file indicates that a Board staff member spoke with Mel Kazarian (a Partner with Employer) by telephone on the same day and instructed him to follow the instructions on the closing letter, submit a declaration, and proof of service upon the Division. A review of the Board's file reveals no fax received on or about May 21, 2002, as alleged by Employer.

conduct by looking at the entire post-citation time period and to focus on delays caused by the Board. However, a close review of the events discussed above reveals unexplained and unreasonable delays by Employer in providing the required document (completed appeal form) to the Board in order for the appeal to be docketed and processed by the Board.

Further, Employer refers to efforts it made on September 27, 2002, to speak with the enforcement agency, the Division, about the status of the appeal. Such efforts did not excuse it from communicating with the Appeals Board regarding the perfection of its appeal. By statute (Labor Code §§ 6302, 148 et seq. and 6307) and in practice, the Division and the Appeals Board are separate agencies with distinct and separate responsibilities under the law. (*Greka Energy*, Cal/OSHA App. 03-9318, Denial of Petition for Reconsideration (Dec. 23, 2003).) The requirement that an appeal form be filed with the Board is plainly stated in a Board regulation (section 359.1), in the citation itself, in the form communication sent to employers acknowledging the initiation of the appeal, and in the closing letter when an appeal form is not timely submitted.

Under the circumstances, we find that good cause was not established for the delay and Employer has not provided a sufficient basis to reverse the order closing the appeal which was based upon Employer's failure to timely file the appeal form.

DECISION

The Board affirms its Order Closing Appeal dated February 27, 2004, closing Employer's appeal.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: April 23, 2004